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# Keep Your Powder Dry and Your Standards High: Protect the Second Amendment's Core with Strict Scrutiny Review

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**KEEP YOUR POWDER DRY AND YOUR STANDARDS HIGH:  
PROTECT THE SECOND AMENDMENT’S CORE WITH STRICT  
SCRUTINY REVIEW**

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## I. INTRODUCTION

Americans love their guns, and they own a lot of them.<sup>1</sup> Some studies estimate that there are over 300 million firearms in the United States, which means there are more guns in America than people.<sup>2</sup> In the light of recent mass shootings,<sup>3</sup> especially those at Sandy Hook Elementary School,<sup>4</sup> San Bernardino,<sup>5</sup> Pulse night club in Orlando,<sup>6</sup> and Las Vegas,<sup>7</sup> there has been a renewed push for restrictions on firearm ownership in the United States.<sup>8</sup> Some of it aims for enhanced background checks, but much is directed at restricting

<sup>1</sup> See generally Thomas Martienssen, *Why Americans love their guns*, BBC NEWS (Feb. 17, 2016), <http://www.bbc.com/news/magazine-35590249>.

<sup>2</sup> Christopher Ingraham, *There are now more guns than people in the United States*, WASH. POST (Oct. 5, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/?utm\\_term=.590897767651](https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/?utm_term=.590897767651).

<sup>3</sup> A mass shooting is a shooting incident in which “four or more people are killed or injured by gunfire.” Christopher Ingraham, *What makes a ‘mass shooting’ in America*, WASH. POST (Dec. 3, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/12/03/what-makes-a-mass-shooting-in-america/?utm\\_term=.464a9015ba7d](https://www.washingtonpost.com/news/wonk/wp/2015/12/03/what-makes-a-mass-shooting-in-america/?utm_term=.464a9015ba7d) (emphasis omitted).

<sup>4</sup> During the massacre at Sandy Hook Elementary School on December 14, 2012, the assailant used a Bushmaster XM15-E2S rifle, which is an AR-15 model. *Maker of rifle used in Sandy Hook shooting seeks dismissal of lawsuit*, CHI. TRIBUNE (Feb. 22, 2016, 5:35 PM), <http://www.chicagotribune.com/news/nationworld/ct-gunmaker-sandy-hook-lawsuit-20160222-story.html>.

<sup>5</sup> On December 2, 2015, Syed Rizwan Farook and Tashfeen Malik killed 14 people and injured more at a holiday party at the Inland Regional Center in San Bernardino, CA. Sari Horwitz, *Guns used in San Bernardino shooting were purchased legally from dealers*, WASH. POST (Dec. 3, 2015), [https://www.washingtonpost.com/world/national-security/suspects-in-san-bernadino-shooting-had-a-small-arsenal/2015/12/03/9b5d7b52-99db-11e5-94f0-9eeaff906ef3\\_story.html?utm\\_term=.8ec8db747d78](https://www.washingtonpost.com/world/national-security/suspects-in-san-bernadino-shooting-had-a-small-arsenal/2015/12/03/9b5d7b52-99db-11e5-94f0-9eeaff906ef3_story.html?utm_term=.8ec8db747d78). They carried two semi-automatic weapons, which were versions of the AR-15, and two semi-automatic handguns. *Id.*

<sup>6</sup> On June 12, 2016, Omar Mateen killed 49 people and wounded 53 at Pulse in Orlando, FL. Ralph Ellis et al., *Orlando shooting: 49 killed, shooter pledged ISIS allegiance*, CNN (June 13, 2016), <http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/>. He carried an assault-style rifle and a pistol. *Id.*

<sup>7</sup> See Patrick May, *A look at the Nevada gun laws that may have helped Las Vegas Shooter*, MERCURY NEWS (Oct. 2, 2017), <http://www.mercurynews.com/2017/10/02/a-look-at-the-nevada-gun-laws-that-may-have-helped-las-vegas-shooter/>.

<sup>8</sup> *After Mass Shootings, Action On Gun Legislation Soars At State Level*, NPR (July 12, 2016, 6:12 PM), <http://www.npr.org/2016/07/12/485726439/mass-shootings-influence-spike-in-gun-related-laws-at-state-level>.

ownership of assault-style rifles,<sup>9</sup> which assailants have used in a number of shootings.<sup>10</sup> Congress has attempted, off and on, to regulate assault-style rifles.<sup>11</sup> As always, gun control legislation is a contentious issue in the United States.<sup>12</sup> America has high rates of homicide compared to other nations.<sup>13</sup> Still, after over 200 years of American history, there is very little Supreme Court precedent regarding infringements upon the right to keep and bear arms.<sup>14</sup> Not until 2008, in *District of Columbia v. Heller*,<sup>15</sup> did the Court determine that the Second Amendment conferred an individual right to keep and bear arms, and not until

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<sup>9</sup> See Ryan Struyk, *Here are the gun control policies that majorities in both parties support*, CNN (Oct. 2, 2017), <http://www.cnn.com/2017/10/02/politics/bipartisan-gun-control-policies-majorities/index.html>. The AR-15 is the most commonly-owned semi-automatic assault-style rifle, which requires one to pull down the trigger each time to shoot. *Why the AR-15 is America's Most Popular Rifle*, NRA BLOG (Jan. 20, 2016), <https://www.nrablog.com/articles/2016/1/why-the-ar15-is-americas-most-popular-rifle/>. It can fire 45–60 rounds per minute, compared to fully automatic weapons, which can fire over 800 rounds per minute. *The Truth About "Assault Weapons"*, CCDL BLOG (Jan. 13, 2013), <http://ccd1.us/blog/2013/01/13/the-truth-about-assault-weapons/>. To operate a fully automatic weapon, the user holds down the trigger, creating rapid fire. *Id.* “[I]n 2012, the number of AR- and AK-style weapons manufactured and imported into the United States was more than double the number of Ford F-150 trucks sold, the most commonly sold vehicle in the United States.” *Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2016), *vacated en banc*, 849 F.3d 114 (4th Cir. 2017).

<sup>10</sup> Joseph D. Lyons, *How Many Mass Shootings Were AR-15 Rifles Involved In? It's Not The Only Semiautomatic Rifle On The Block*, BUSTLE (June 17, 2016), <https://www.bustle.com/articles/167502-how-many-mass-shootings-were-ar-15-rifles-involved-in-its-not-the-only-semiautomatic-rifle-on>.

<sup>11</sup> Congress passed an assault weapons ban in 1994, but it expired in 2004. Halimah Abdullah, *Obama remains committed to assault weapons ban, White House says*, CNN: POLITICS, <http://www.cnn.com/2012/12/14/politics/obama-assault-weapons/index.html> (last updated Dec. 19, 2012, 8:46 AM). Since 2004, there has been much debate about renewal. *Id.*; Brad Plumer, *Everything you need to know about the assault weapons ban, in one post*, WASH. POST (Dec. 17, 2012), [https://www.washingtonpost.com/news/wonk/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post/?utm\\_term=.e70756a1c059](https://www.washingtonpost.com/news/wonk/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post/?utm_term=.e70756a1c059).

<sup>12</sup> See generally Mark Hendrickson, *Gun Control: 10 Observations On A Controversial Subject*, FORBES 17, 2013, 12:58 PM), <http://www.forbes.com/sites/markhendrickson/2013/01/17/gun-control-10-observations-on-a-controversial-subject/#7019988133ed>.

<sup>13</sup> Nick Wing, *Thousands Of Americans Are Gunned Down Each Year, But Few Die By Assault-Style Rifle*, HUFFPOST (June 17, 2016, 12:52 PM), [http://www.huffingtonpost.com/entry/assault-weapons-deaths\\_us\\_5763109de4b015db1bc8c123](http://www.huffingtonpost.com/entry/assault-weapons-deaths_us_5763109de4b015db1bc8c123). “Americans are 10 times more likely to be killed with a gun than people in other developed nations.” *Id.*

<sup>14</sup> In *United States v. Miller*, the Court recognized that many states had enacted at least some type of Second Amendment restriction, which had led to “somewhat variant conclusions concerning the scope of the right guaranteed.” 307 U.S. 174, 182 (1939).

<sup>15</sup> 554 U.S. 570 (2008).

2010, in *McDonald v. City of Chicago*,<sup>16</sup> did the Court hold that this right was fundamental.<sup>17</sup>

Although *Heller* and *McDonald* were monumental decisions, the Court refrained from designating a standard of review when analyzing laws that infringe upon firearm ownership. Federal appellate courts originally split on this issue, choosing to apply different standards.<sup>18</sup> For example, while the Fourth Circuit held in 2016 that strict scrutiny is the appropriate standard,<sup>19</sup> the Second Circuit applied intermediate scrutiny in 2015 to uphold firearm restrictions in New York and Connecticut.<sup>20</sup> Now, after a rehearing en banc in the Fourth Circuit, all Circuits that have considered the proper standard of review for firearm restrictions are in agreement that intermediate scrutiny is appropriate.<sup>21</sup> Since *Heller* and *McDonald*, the Supreme Court has declined to take up a number of Second Amendment issues, including issues that would resolve the question

<sup>16</sup> 561 U.S. 742 (2010).

<sup>17</sup> *Id.* at 789–91.

<sup>18</sup> The Fourth Circuit decision, *Kolbe v. Hogan*, was reheard en banc and overturned, but the original decision is important to the argument put forth in this Note. *Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2016), *vacated en banc*, 849 F.3d 114 (4th Cir. 2017). This Note will focus on the differences between the Fourth Circuit and the Second Circuit, but other circuits have come to different conclusions on the issue as well. In 2011, the District of Columbia Circuit issued a ruling similar to the Second Circuit's. *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011). In 2014, the Sixth Circuit instructed a lower court in Tennessee to use strict scrutiny to evaluate a gun prohibition, but the case was reheard en banc and reversed. *Tyler v. Hillsdale County Sheriff's Dept.*, 775 F.3d 308 (6th Cir. 2014), *vacated en banc*, 837 F.3d 678 (6th Cir. 2015). In 2015, the Seventh Circuit upheld an "assault weapons" ban in Chicago. *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015). The court chose not to focus on standards of scrutiny but instead on "whether a regulation bans weapons that were common at the time of ratification" or are related to the preservation of a militia. *Id.* at 410. Justice Scalia explicitly rejected this theory, arguing that it is "bordering on the frivolous" and that commonly used means weapons that are commonly used at the time of the regulation. *Heller*, 554 U.S. at 582, 627–28. The Ninth Circuit held that intermediate scrutiny was appropriate in upholding a law materially identical to the law at issue in the Seventh Circuit's decision. *Compare Fyock v. Sunnyvale*, 779 F.3d 991, 999–1001 (9th Cir. 2015) (upholding the application of intermediate scrutiny to find a ban on magazines holding more than ten rounds as valid), *with Friedman*, 784 F.3d at 412 (upholding a ban on semi-automatic guns and large-capacity machine guns).

<sup>19</sup> *Kolbe*, 813 F.3d at 192.

<sup>20</sup> *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015).

<sup>21</sup> Alison Frankel, *Second Amendment does not apply to assault weapons: en banc 4th Circuit*, REUTERS (Feb. 22, 2017, 4:07 PM), <https://www.reuters.com/article/us-otc-guns/second-amendment-does-not-apply-to-assault-weapons-en-banc-4th-circuit-idUSKBN1612PU>.

of the proper standard of review.<sup>22</sup> This issue, however, is one that the Court could possibly examine now that Justice Neil Gorsuch has been confirmed.<sup>23</sup>

In the wake of impending changes to Second Amendment jurisprudence,<sup>24</sup> this Note will argue that all restrictions upon firearms that reach the core of the Second Amendment under *Heller* (commonly-used firearms possessed in the home for self-defense) should be subject to strict scrutiny review.<sup>25</sup> Because the right to keep and bear arms is a fundamental right, courts should afford it the same level of protection as they afford free speech<sup>26</sup> and other fundamental rights explicitly or implicitly protected in the United States Constitution. Courts may impose a lower standard of review on restrictions that fall outside of the core of the Second Amendment. A strict scrutiny standard is appropriate for the Second Amendment's core so that fundamental liberties can continue to be protected in every jurisdiction nationwide.

In Part II, this Note will provide a detailed background of Second Amendment jurisprudence. In Part III, it will argue that the Fourth Circuit's original approach was proper in holding that laws infringing upon the core of the Second Amendment must survive strict scrutiny review. It will make explicit comparisons between the Second Amendment and the First Amendment, ultimately arguing that because they are equally fundamental, they should be equally protected and similarly approached. Because *Heller* was such a huge advancement after decades of non-existent Second Amendment law, the Supreme Court now has a unique opportunity to delineate standards of review for the first time. In order to adequately protect fundamental American liberties

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<sup>22</sup> Ariane de Vogue, *Supreme Court declines to take up ban on assault weapons*, CNN: POLITICS (Dec. 9, 2015, 8:33 AM), <http://www.cnn.com/2015/12/07/politics/scotus-declines-to-take-up-ban-on-assault-weapons/index.html> (referring to *Friedman*, 784 F.3d 406). Justices Antonin Scalia and Clarence Thomas insisted that the appeals court disregarded their rulings in *Heller* and *McDonald*. *Editorial: Welcome victory for an assault weapons ban*, CHI. TRIBUNE (Dec. 7, 2015, 3:47 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-supreme-court-highland-park-gun-edit-1208-20151207-story.html>.

<sup>23</sup> Olivia Li, *The Four Big Gun Rights Questions the Supreme Court May Have to Sort Out*, TRACE (Mar. 2, 2016), <https://www.thetrace.org/2016/03/important-gun-rights-questions-supreme-court-might-answer/>; see also *Peruta v. California*, 137 S.Ct. 1995, 1996 (2017) (Thomas, J., dissenting) (mem.), *denying cert. to Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016). *Peruta* raised a Second Amendment issue that could have allowed the Supreme Court to discuss the standard of review to be applied. *Id.* The Court declined to take on the issue, but Justice Gorsuch joined in the dissenting opinion, which indicates his vote may eventually sway the Court to accept this issue in the future. *Id.*

<sup>24</sup> See generally *id.*

<sup>25</sup> The Author acknowledges that restrictions on magazine capacity are an important part of this conversation and a distinguishing factor among types of semi-automatic weapons. Magazine capacity, however, is outside the scope of this Note. This Note will focus only on restrictions on ownership of firearms themselves.

<sup>26</sup> See *infra* Section II.C.

and to follow the Court's precedent in its modern approach to such rights, the Supreme Court should hold that restrictions upon the Second Amendment's core must be subject to strict scrutiny review.

## II. BACKGROUND

This Part begins with a historical background of the right to bear arms, which became the American Second Amendment. Section II.B will explain how the Court treats fundamental rights in the United States and the process of incorporating rights to the states. Section II.C will discuss how courts use these principles to analyze speech restrictions under the First Amendment, paving the way for an argument that the Second Amendment should be treated similarly. Section II.D will explain modern Second Amendment jurisprudence and, specifically, the cases of *Heller* and *McDonald*, which established that the Second Amendment is both an individual and a fundamental right. Section II.E will discuss the different approaches that two circuit courts—the Second Circuit and the Fourth Circuit—originally took regarding treatment of firearm restrictions that reach the core of the Second Amendment. Finally, Section II.F will analyze how the appointment of Justice Neil Gorsuch could potentially affect the country's current Second Amendment jurisprudence.

### A. History of the Second Amendment

In drafting the Bill of Rights, the members of the Constitutional Convention included the Second Amendment, which states that “[a] well regulated [m]ilitia being necessary to the security of a free [s]tate, the right of the people to keep and bear [a]rms shall not be infringed.”<sup>27</sup> It is commonly believed that the Second Amendment was meant to codify a pre-existing right, which the colonists already expected to enjoy as their own; this is inferred in part, as Justice Antonin Scalia points out in *Heller*, by the use of the language “shall not be infringed.”<sup>28</sup> History, in which the founding fathers were well-versed, told of governments that disarmed their own people in order to preserve power, leaving their subjects more vulnerable to tyranny and oppression by the hands of the few.<sup>29</sup>

England in particular had a long line of religious and political leaders who used disarmament to solidify their power. For example, in 1181, Henry II issued the Assize of Arms, which allowed those closest to him to hold more

<sup>27</sup> U.S. CONST. amend. II; see also Jeffrey Toobin, *So You Think You Know The Second Amendment?*, NEW YORKER (Dec. 17, 2012), <http://www.newyorker.com/news/daily-comment/so-you-think-you-know-the-second-amendment>.

<sup>28</sup> District of Columbia v. *Heller*, 554 U.S. 570, 592 (2008).

<sup>29</sup> See *infra* notes 30–38 and accompanying text.

advanced weapons than the masses, leaving the poorest with the least effective protection.<sup>30</sup> In 1640, King Charles I, wishing to strengthen the Church of England, issued the ecclesiastical canons affirming the Divine Right of Kings.<sup>31</sup> The canons stated that bearing arms against one's king, for whatever reason, even if in self-defense, is "to resist the powers which are ordained of God," and that anyone who engages in such activity shall receive "damnation."<sup>32</sup> King Charles II ordered disarmament of Protestant regions that were home to his enemies.<sup>33</sup> Protestants retaliated against King Charles II by enacting protections within their own Declaration of Rights, stating, "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law."<sup>34</sup>

The Protestant-based right to bear arms became an important part of English life. William Blackstone described it as "the natural right of resistance and self-preservation,"<sup>35</sup> and "the right of having and using arms for self-preservation and defence."<sup>36</sup> It is commonly believed that this English tradition was the basis for the Second Amendment in the new United States.<sup>37</sup> The colonists faced infringements on this right in the days leading up to the American Revolution. In the 1760s and 1770s, King George III attempted to disarm the colonists in some of the most rebellious areas, which invoked a backlash based on their traditionally recognized rights, as Englishmen, to keep and bear arms.<sup>38</sup>

In forming their new nation, the leaders of the independence movement intended to continue the English tradition of the right to keep and bear arms.<sup>39</sup> The federalists and anti-federalists agreed on the importance of the right, even if

<sup>30</sup> The Assize of Arms para. 4 (1181), in 2 ENGLISH HISTORICAL DOCUMENTS 416 (David C. Douglas & George W. Greenaway eds., 1953).

<sup>31</sup> Constitutions and Canons Ecclesiastical, Treated Upon by the Archbishops of Canterbury and York (1640), in 1 SYNODALIA 389–91 (Edward Cardwell ed. 1842).

<sup>32</sup> *Id.* at 390–91.

<sup>33</sup> *Heller*, 554 U.S. at 593 (citing J. MALCOLM, TO KEEP AND BEAR ARMS 103–06 (1994)).

<sup>34</sup> *Id.* at 593 (citation omitted).

<sup>35</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*144.

<sup>36</sup> *Id.*

<sup>37</sup> *Heller*, 554 U.S. at 593 (citing E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 51 (1957); W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 122 (1825)).

<sup>38</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010). The British proceeded to attempt to disarm the colonists, proclaiming that to leave the city, colonists must "deposit[] their arms with their own magistrates." WAYNE LAPIERRE, GUNS, CRIME AND FREEDOM (1994), as reprinted in *Bill of Rights*, JAMES MADISON RESEARCH LIBRARY & INFO. CTR., [http://www.madisonbrigade.com/library\\_bor.htm](http://www.madisonbrigade.com/library_bor.htm) (last visited Oct. 8, 2017).

<sup>39</sup> *History: A Drafting and Ratification of the Bill of Rights in the Colonial Period*, JAMES MADISON RESEARCH LIBRARY & INFO. CTR. [hereinafter *History*], [http://www.madisonbrigade.com/library\\_bor.htm](http://www.madisonbrigade.com/library_bor.htm) (last visited Oct. 8, 2017).



they disagreed on whether to add the Bill of Rights to the Constitution in the first place.<sup>40</sup> St. George Tucker described the right to bear arms as “the true palladium of liberty.”<sup>41</sup> At the time of the drafting of the Constitution, four states had already codified their own versions of the Second Amendment, citing the right to “bear arms in defence of themselves and the state.”<sup>42</sup> After ratification, nine more states adopted their own constitutional provisions.<sup>43</sup> Almost the entire adult male population was armed.<sup>44</sup>

Much evidence exists to show that at the time of the founding, the right to keep and bear arms was intended for self-defense and meant as an individual right. For example, John Adams acknowledged the self-defense purpose of the right when he famously defended the British soldiers in the aftermath of the Boston Massacre.<sup>45</sup> Adams said, “Here, every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defense, not for offense . . . .”<sup>46</sup> Thomas Jefferson added the following words to the Virginia Constitution: “No free man shall be debarred the use of arms within his own land.”<sup>47</sup> James Madison said, “Americans [have] the right and advantage of being armed—unlike citizens of other countries whose governments are afraid to trust the people with arms.”<sup>48</sup> In fact, a few of the original colonies enacted statutes *mandating* arms possession and/or carrying.<sup>49</sup> Cases in the early 1800s cited to the “natural” right of self-defense.<sup>50</sup>

Over time, the southern states attempted to “disarm and injure African-Americans,” which led Congress to pass the Freedmen’s Bureau Act of 1866 and the Civil Rights Act of 1866—in part, explicitly, to protect African Americans’ rights to keep and bear arms.<sup>51</sup> It is generally recognized that the Fourteenth Amendment was ratified in order to make sure states were enforcing rights

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<sup>40</sup> *Id.*

<sup>41</sup> *McDonald*, 561 U.S. at 769 (citation omitted).

<sup>42</sup> *Heller*, 554 U.S. at 602. Three other states had adopted “the even more individualistic phrasing that each citizen has the ‘right to bear arms in defence of himself and the State.’” *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *See History*, *supra* note 39.

<sup>45</sup> LAPIERRE, *supra* note 38.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> JOHNSON, KOPEL, MOCSARY, & O’SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 101–08 (2012).

<sup>50</sup> *District of Columbia v. Heller*, 554 U.S. 570, 612 (2008) (citing *Nunn v. State*, 1 Ga. 243, 251 (1846)).

<sup>51</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 745 (2010).

protected by the Civil Rights Act.<sup>52</sup> Notably, the rights protected by the Civil Rights Act included the right to keep and bear arms.<sup>53</sup> Additionally, at the time the Fourteenth Amendment was ratified, 22 of 37 states had explicitly protected the right in their own constitutions—and a number of them explicitly cited the “individual right to self-defense.”<sup>54</sup>

### *B. Fundamental Rights, Strict Scrutiny, and Incorporation*

In the United States, “fundamental rights” are those that are explicitly or implicitly guaranteed by the Constitution.<sup>55</sup> They receive the highest level of protection.<sup>56</sup> To infringe upon a fundamental right, the government’s regulation must be narrowly tailored, using the least restrictive means possible, and it must have a compelling government interest; thus, it is subject to a standard of “strict scrutiny” by the courts.<sup>57</sup> Lesser protections, for non-fundamental rights, include “intermediate scrutiny”<sup>58</sup> and “rational basis” review.<sup>59</sup> Intermediate scrutiny requires that the legislation in question serves important governmental objectives and is substantially related to those objectives.<sup>60</sup> Rational basis review requires that the regulation is rationally related to a legitimate government purpose.<sup>61</sup>

In 1833, the Supreme Court held that the Bill of Rights applied only to the federal government, so state and local governments could still infringe upon rights explicitly protected in the United States Constitution.<sup>62</sup> In the 1920s, the Court began to practice “selective incorporation” of the Bill of Rights to the states through the Fourteenth Amendment, by which individual rights became valid against state and local government infringement as well.<sup>63</sup> In deciding whether a right should be incorporated to the states, the Court has taken many different approaches over the years. The modern trend is to analyze whether a

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 777.

<sup>55</sup> 16B AM. JUR. 2D *Constitutional Law* § 863, Westlaw (database updated Aug. 2017).

<sup>56</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973); 16A AM. JUR. 2D *Constitutional Law* § 403, Westlaw (database updated Aug. 2017).

<sup>57</sup> *Roe*, 410 U.S. at 155; 16A AM. JUR. 2D *Constitutional Law* § 403, Westlaw (database updated Aug. 2017).

<sup>58</sup> *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting); 16B AM. JUR. 2D *Constitutional Law* § 861, Westlaw (database updated Aug. 2017).

<sup>59</sup> *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964); 16B AM. JUR. 2D *Constitutional Law* § 858, Westlaw (database updated Aug. 2017).

<sup>60</sup> 16B AM. JUR. 2D *Constitutional Law* § 861, Westlaw (database updated Aug. 2017).

<sup>61</sup> *Id.* § 858.

<sup>62</sup> *Barron v. Baltimore*, 32 U.S. 243, 251 (1833).

<sup>63</sup> 16A AM. JUR. 2D *Constitutional Law* § 421, Westlaw (database updated Aug. 2017).

constitutional protection is “fundamental to the American scheme of justice”<sup>64</sup> or whether the right is “deeply rooted in this Nation’s history and tradition,”<sup>65</sup> with some justices placing more emphasis on one test than the other.<sup>66</sup> In 1925, in *Gitlow v. New York*,<sup>67</sup> the Supreme Court incorporated the First Amendment’s guarantee of the freedom of speech to the states.<sup>68</sup> The Court did not speak to the true meaning of the Second Amendment until 80 years later, and it did not incorporate it to the states until two years after that.<sup>69</sup>

### C. Judicial Treatment of Speech Restrictions

The First Amendment, in similar fashion to the Second Amendment, stemmed from tyranny by the British church.<sup>70</sup> In the 1500s, the British church and state collaborated to censor publications in order to maintain control and power over their subjects.<sup>71</sup> The American colonists grew to value the right in order to truthfully criticize their government without fear of retribution.<sup>72</sup>

Standards of scrutiny apply differently to different types of speech restrictions.<sup>73</sup> The standard depends on whether the restriction is content-based or content-neutral.<sup>74</sup> Restrictions on speech that target a particular message are content-based and go to the core of the First Amendment.<sup>75</sup> Courts subject them to a standard of strict scrutiny review because political speech and the free exchange of ideas are at the core of what the First Amendment protects.<sup>76</sup> This is because restricting content “pose[s] the inherent risk” that the government is seeking to suppress ideas or manipulate the public through censoring information.<sup>77</sup> To survive strict scrutiny of regulations regarding content-based

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<sup>64</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>65</sup> *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).

<sup>66</sup> *See Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (admonishing the majority’s decision to apply an “unheard-of form of rational-basis review” without discussing whether strict scrutiny would be more appropriate).

<sup>67</sup> 268 U.S. 652 (1925).

<sup>68</sup> *Id.* at 666–67.

<sup>69</sup> *See supra* notes 15–16.

<sup>70</sup> P.A. Madison, *Original Meaning: Freedom of Speech or of the Press*, FEDERALIST BLOG (Oct. 18, 2008), [http://www.federalistblog.us/2008/10/freedom\\_of\\_speech\\_and\\_of\\_the\\_press/](http://www.federalistblog.us/2008/10/freedom_of_speech_and_of_the_press/).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See* 16A AM. JUR. 2D *Constitutional Law* § 480, Westlaw (database updated Aug. 2017).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

speech, the government must show that the restriction meets a compelling governmental interest and that the regulation is narrowly tailored.<sup>78</sup>

On the other hand, content-neutral restrictions, because they do not reach the core of the First Amendment, receive intermediate scrutiny review.<sup>79</sup> These laws regulate the time, place, and manner of expression, and do not target particular messages or intend to limit speech that the government disfavors.<sup>80</sup> For a content-neutral law to survive intermediate scrutiny, it must “further[] an important or substantial government interest; the governmental interest [must be] unrelated to the suppression of free expression; and, the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest.”<sup>81</sup>

Thus, when analyzing restrictions upon speech, courts use “sliding-scale” scrutiny.<sup>82</sup> When a regulation impacts the core of the fundamental right, strict scrutiny is applied; when it affects the right, but not the core of the right, intermediate scrutiny is applied.<sup>83</sup> Different categories of speech, therefore, fall under different levels of protection.

#### D. Modern Second Amendment Jurisprudence

In 2008, over 215 years after the Second Amendment’s ratification, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment is an individual right rooted in self-defense,<sup>84</sup> and in 2010, the Court proceeded to hold in *McDonald v. City of Chicago* that the right is fundamental.<sup>85</sup>

##### 1. *District of Columbia v. Heller*

In *Heller*, the Supreme Court recognized for the first time that the Second Amendment is an individual right.<sup>86</sup> The issue involved the constitutionality of a Washington, D.C., law prohibiting the possession of handguns.<sup>87</sup> The law prohibited carrying an unregistered firearm, but it also

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Michael J. Habib, *The Second Amendment Standard of Review: The Quintessential Clean-Slate for Sliding-Scale Scrutiny*, 37 ADMIN. & REG. L. NEWS 13, 14 (2012).

<sup>83</sup> *Id.*

<sup>84</sup> *District of Columbia v. Heller*, 554 U.S. 570, 622–25 (2008).

<sup>85</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 789–91 (2010).

<sup>86</sup> *Heller*, 554 U.S. at 570.

<sup>87</sup> *Id.* at 574.

prohibited the registration of firearms, effectively barring ownership.<sup>88</sup> Dick Heller, a D.C. special police officer authorized to carry a gun while on duty at a federal building, sought to register a handgun to keep at home, but the city denied his request.<sup>89</sup> He filed a lawsuit, and, ultimately, his case reached the Supreme Court.<sup>90</sup>

In analyzing the meaning of the Second Amendment in his majority opinion, Justice Scalia discussed the two main schools of thought regarding its interpretation. One idea, which the dissent in *Heller* supports,<sup>91</sup> is that the Second Amendment protects the right to possess and carry a firearm “in connection with militia service.”<sup>92</sup> The other idea, which the majority opinion held as true, is that the Second Amendment is an individual right to possess a firearm for self-defense, unrelated to militia service.<sup>93</sup>

The Court detailed the historical significance of an armed population, listing societies that used political militaries to suppress their unarmed, defenseless people.<sup>94</sup> The prefatory clause<sup>95</sup> was meant to prevent elimination of the militia,<sup>96</sup> but having a militia was not the only reason the right was valued.<sup>97</sup> Had the only purpose of the right been to preserve the existence of a militia, and citizens were not able to individually join (or choose not to join) the militia, then the purpose of a citizens’ militia would be defeated, for the government could decide who would be in it.<sup>98</sup>

Despite the majority’s long discussion of the historic importance of the Second Amendment, Justice Scalia wrote, “[o]f course the right was not unlimited, just as the First Amendment’s right of free speech was not.”<sup>99</sup> The majority laid out a list of regulations that can be acceptable under the Second Amendment, including prohibition of possession by felons and the mentally ill,

<sup>88</sup> *Id.* at 574–75.

<sup>89</sup> *Id.* at 575.

<sup>90</sup> *Id.* at 576.

<sup>91</sup> *Id.* at 636 (Stevens, J., dissenting).

<sup>92</sup> *Id.* at 577 (majority opinion).

<sup>93</sup> *Id.* at 622–25.

<sup>94</sup> *Id.* at 592–95.

<sup>95</sup> The Second Amendment’s prefatory clause is “[a] well regulated Militia, being necessary to the security of a free State,” and the operative clause is “the right of the people to keep and bear Arms, shall not be infringed.” *United States: Gun Ownership and the Supreme Court*, LIBRARY OF CONG., <https://www.loc.gov/law/help/second-amendment.php> (last visited Oct. 8, 2017).

<sup>96</sup> A militia is defined as “a part of the organized armed forces of a country liable to call only in emergency.” *Militia*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/militia> (last visited Nov. 14, 2017).

<sup>97</sup> *Heller*, 554 U.S. at 599.

<sup>98</sup> *Id.* at 600.

<sup>99</sup> *Id.* at 595.

carrying in schools and government buildings, and regulations on the commercial sale of firearms.<sup>100</sup> It noted that the Second Amendment protects the types of firearms that were “in common use at the time” when a case is being decided.<sup>101</sup> The Court expressly rejected the idea that the right to bear arms includes only those arms available at the time the amendment was drafted.<sup>102</sup> The majority, drawing from precedent stemming from other Amendments, noted that the First Amendment protects new forms of technology used for speech,<sup>103</sup> the Fourth Amendment includes modern forms of search,<sup>104</sup> and, therefore, the Second Amendment has evolved over time to include modern firearms.<sup>105</sup> The Second Amendment encompasses weapons that “were not specifically designed for military use and were not employed in a military capacity.”<sup>106</sup> The majority acknowledged that prohibitions on the carrying of “dangerous and unusual weapons”<sup>107</sup> was acceptable.<sup>108</sup>

Ultimately, the Court held that “the Second Amendment conferred an individual right to keep and bear arms,” that “statutes banning handgun possession in the home violated the Second Amendment,” and that the city’s statute “containing prohibition against rendering any lawful firearm in the home operable for purpose of immediate self-defense violated [the] Second

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<sup>100</sup> *Id.* at 626–27.

<sup>101</sup> *Id.* at 627.

<sup>102</sup> *Id.* at 582.

<sup>103</sup> For instance, radio, television, and movies did not exist when the Bill of Rights was ratified, but they now fall into the free speech and free press clauses in the First Amendment. LAPIERRE, *supra* note 38.

<sup>104</sup> See, e.g., *Riley v. California*, 134 S. Ct. 2473, 2495 (2014) (holding that police must get a warrant before searching a cell phone seized incident to an arrest).

<sup>105</sup> *Heller*, 554 U.S. at 582.

<sup>106</sup> *Id.* at 581.

<sup>107</sup> For instance, all courts since *Heller* have found that machine guns are dangerous and unusual, and, therefore, there is no Second Amendment right to possess one. Ian Millhiser, *Federal Appeals Court Holds Second Amendment Does Not Allow People To Own Machine Guns*, THINKPROGRESS (Aug. 15, 2012, 10:00 PM), <https://thinkprogress.org/federal-appeals-court-holds-second-amendment-does-not-allow-people-to-own-machine-guns-f94d0fbb2d23#.t37tabcc3>.

<sup>108</sup> *Heller*, 554 U.S. at 627 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*55, \*148–49 (1769); 3 B. WILSON, WORKS OF THE HONOURABLE JAMES WILSON 79 (1804); J. DUNLAP, THE NEW-YORK JUSTICE 8 (1815); C. HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822); 1 W. RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271–72 (1831); H. STEPHEN, SUMMARY OF THE CRIMINAL LAW 48 (1840); E. LEWIS, AN ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 64 (1847); F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 726 (1852); see also *O’Neill v. State*, 16 Ala. 65, 67 (1849); *State v. Lanier*, 71 N.C. 288, 289 (1874); *State v. Langford*, 10 N.C. 381, 383–84 (1824); *English v. State*, 35 Tex. 473, 476 (1871)).

Amendment.”<sup>109</sup> According to the majority, the American people in 2008 considered the handgun the “quintessential self-defense weapon,” and, therefore, a complete prohibition of handguns is “invalid.”<sup>110</sup>

## 2. *McDonald v. City of Chicago*

After *Heller*, Chicago and the nearby suburb Oak Park had laws “effectively banning handgun possession by almost all private citizens.”<sup>111</sup> The petitioners sued, arguing that the bans were unconstitutional under *Heller*.<sup>112</sup>

The Chicago petitioners were residents who wished to keep handguns in their homes for self-defense but could not do so under Chicago’s laws.<sup>113</sup> The petitioners, a few of whom had been subjected to burglaries and threats from drug dealers, argued that the ban left them vulnerable to criminals.<sup>114</sup> They argued, among other things, that the Fourteenth Amendment’s Due Process Clause incorporated the Second Amendment right as established in *Heller*.<sup>115</sup>

The Court wrote that *Heller* “unmistakably” recognized that self-defense is a basic right and that individual self-defense is “the central component” of the Second Amendment right.<sup>116</sup> It also emphasized *Heller*’s language regarding the “esteem with which the right was regarded during the colonial era” and when the Bill of Rights was ratified, using these perspectives as evidence that the right was historically viewed as fundamental.<sup>117</sup> The Court held, therefore, that the Second Amendment was fundamental and incorporated it to the states.<sup>118</sup>

## E. *Circuit Decisions Post-McDonald*

In light of *Heller* and *McDonald*, circuit courts have implemented different standards of review when analyzing restrictions on firearm ownership. While multiple circuits, including the Second, have held that intermediate scrutiny is acceptable in certain circumstances,<sup>119</sup> the Fourth Circuit originally

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<sup>109</sup> *Id.* at 570.

<sup>110</sup> *Id.* at 629.

<sup>111</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 742 (2010).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 750.

<sup>114</sup> *Id.* at 751.

<sup>115</sup> *Id.* at 742–43.

<sup>116</sup> *Id.* at 767 (emphasis omitted).

<sup>117</sup> *Id.* at 745.

<sup>118</sup> *Id.* at 791; *see supra* Section II.B.

<sup>119</sup> *See supra* note 18 and accompanying text.

applied a strict scrutiny standard of review.<sup>120</sup> The court reheard the case en banc and went the other way, deciding that the types of weapons at issue were not protected by the Second Amendment.<sup>121</sup> For the purposes of presenting a contrasting point to the Second Circuit's decision, however, this Note will use the Fourth Circuit's original opinion to form an argument. This Section will discuss the Second and Fourth Circuits' decisions (before the Fourth Circuit reheard the case en banc).

### 1. Second Circuit Approach

In 2015, in *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*,<sup>122</sup> a combination of interested groups challenged New York's Secure Ammunition and Firearms Enforcement Act and Connecticut's Act Concerning Gun Violence Prevention and Children's Safety.<sup>123</sup> The laws in question prohibited possession of certain semi-automatic weapons and large capacity magazines.<sup>124</sup>

The Second Circuit noted that *Heller* and *McDonald*, by failing to delineate the precise scope of the Second Amendment, left the judicial system with "little guidance" for resolving future Second Amendment issues.<sup>125</sup> The court adopted a two-part analysis: first, determine whether the regulated weapons fall within the protections of the Second Amendment, and if they do, consider the nature and severity of the infringement, which determines the appropriate level of constitutional scrutiny.<sup>126</sup>

In step one, the court looked to the language in *Heller* that points to the Second Amendment's protection of "the sorts of weapons" that are "in common use" and "typically possessed by law-abiding citizens for lawful purposes."<sup>127</sup> The court noted that millions of Americans own the firearms at issue, and the same is true for large-capacity magazines.<sup>128</sup> It held, therefore, that the firearms were "in common use" as the term was ordained in *Heller*.<sup>129</sup> The court proceeded to address whether the weapons were "typically possessed by law-

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<sup>120</sup> Kolbe v. Hogan, 813 F.3d 160, 174 (4th Cir. 2016), *vacated en banc*, 849 F.3d 114 (4th Cir. 2017).

<sup>121</sup> Kolbe v. Hogan, 849 F.3d 114, 137 (4th Cir. 2017).

<sup>122</sup> 804 F.3d 242 (2d Cir. 2015).

<sup>123</sup> *Id.* at 249–50.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 253–54.

<sup>126</sup> *Id.* at 253.

<sup>127</sup> *Id.* at 254–55.

<sup>128</sup> *Id.* at 255.

<sup>129</sup> *Id.*



abiding citizens for lawful purposes.”<sup>130</sup> In analyzing this, the court looked at whether the weapon is “‘dangerous and unusual’ in the hands of law-abiding civilians” (which are types of firearms acceptable to prohibit under *Heller*).<sup>131</sup> Because the Supreme Court had delineated the AR-15 as the “civilian version” of the weapon, and citing a lack of guidance from the Supreme Court, the Second Circuit agreed, “for the sake of argument,”<sup>132</sup> that these weapons were “typically possessed by law-abiding citizens for lawful purposes.”<sup>133</sup> Thus, under step one, the weapons were protected by the Second Amendment.<sup>134</sup>

In step two, deciding whether heightened scrutiny should apply, the Second Circuit considered “how close the law comes to the core of the Second Amendment right” and, then, “the severity of the law’s burden on the right.”<sup>135</sup> The court wrote that if a law does not “implicate the core protections” of the Second Amendment, and it does not “substantially burden their exercise,” it does not receive heightened scrutiny.<sup>136</sup> It noted that these statutes implicated the core but did not do so to the extent as was seen in *Heller* and *McDonald* because the weapons in this case were not as widely owned.<sup>137</sup> In examining the severity of the law’s burden on the right, the court analyzed whether the law burdened the Second Amendment “substantially.”<sup>138</sup> The court stated that no substantial burden exists “if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.”<sup>139</sup> Heightened scrutiny, therefore, was appropriate—but not necessarily strict scrutiny.<sup>140</sup> The court reasoned that because New York and Connecticut had not banned an “entire class of arms,” as the statutes in *Heller*

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<sup>130</sup> *Id.* at 256.

<sup>131</sup> *Id.*

<sup>132</sup> These types of arguments are often used in situations in which, even if you give the opposing party a win on this smaller contended issue, the end result would favor the one making the argument. *Arguendo*, TRANSLEGAL, <https://www.translegal.com/legal-english-lessons/arguendo-2> (last visited Oct. 8, 2017). Here, the court does not reach a conclusion on whether the weapons were typically possessed; it proceeds to the next part of the analysis. *Cuomo*, 804 F.3d at 256.

<sup>133</sup> *Cuomo*, 804 F.3d at 257.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 258. Interestingly, the Ninth Circuit recently held that, even though the law implicated the core of the Second Amendment, a state fee imposed on firearm transfers did not violate the Second Amendment because it did not impose a substantial burden on anyone’s ability to actually get a firearm. *See* *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017).

<sup>136</sup> *Cuomo*, 804 F.3d at 258.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 259.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 260.

and *McDonald* did, the restrictions at issue were much less burdensome, and intermediate scrutiny, rather than strict scrutiny, was the appropriate standard.<sup>141</sup>

The court held that because the state had an important government interest in public safety and crime prevention, the laws survived intermediate scrutiny, and, therefore, the core prohibitions in the statutes did not violate the Second Amendment.<sup>142</sup>

## 2. Original Fourth Circuit Approach

In *Kolbe v. Hogan*,<sup>143</sup> the Fourth Circuit examined the validity of Maryland's Firearm Safety Act ("FSA").<sup>144</sup> The statute banned ownership of certain types of semi-automatic rifles and detachable magazines.<sup>145</sup> Multiple interested parties brought suit against Maryland state officials, alleging that the statute was unconstitutional.<sup>146</sup>

The Fourth Circuit applied a two-part approach that was similar to, but slightly different from, the Second Circuit's approach.<sup>147</sup> First, it analyzed "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," which essentially meant it looked at whether the law reached the Second Amendment's core.<sup>148</sup> Second, if the restriction did reach the core, it moved to applying an appropriate form of means-end scrutiny.

First, the court concluded that the banned semi-automatic rifles are in common use by law-abiding citizens.<sup>149</sup> The FSA, it said, prohibited possession of the "vast majority of semi-automatic rifles commonly kept by several million American citizens for defending their families and homes" and for use for other purposes.<sup>150</sup> The court held that semi-automatic rifles are commonly owned and

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 269.

<sup>143</sup> 813 F.3d 160 (4th Cir. 2016), *vacated en banc*, 849 F.3d 114 (4th Cir. 2017).

<sup>144</sup> *Id.* at 161.

<sup>145</sup> MD. CODE ANN., PUB. SAFETY § 5-101 (West 2016).

<sup>146</sup> *Kolbe*, 813 F.3d at 161.

<sup>147</sup> *See id.* at 171; *see also Cuomo*, 804 F.3d at 253.

<sup>148</sup> *Kolbe*, 813 F.3d at 171–72 (quoting *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010)).

<sup>149</sup> *Id.* at 174. The court noted that over eight million AR- and AK-platform semi-automatic rifles were manufactured or imported into the United States between 1990 and 2012. *Id.* It then stated that "in 2012, the number of AR- and AK-style weapons manufactured and imported into the United States was more than double the number of Ford F-150 trucks sold, the most commonly sold vehicle in the United States." *Id.* Additionally, over 75 million large-capacity magazines are in circulation in the United States. *Id.*

<sup>150</sup> *Id.* at 168.

used for lawful purposes and, therefore, are covered by the Second Amendment.<sup>151</sup>

In step two, the court, for several reasons, found that the district court erred in applying intermediate scrutiny and that strict scrutiny was the appropriate standard.<sup>152</sup> First, it found that the FSA implicated the core of the Second Amendment because it burdened the availability of arms where the protection afforded by the Second Amendment is at its greatest—in the home for self-defense.<sup>153</sup> Second, the court found that that FSA’s restrictions “substantially burden” the right.<sup>154</sup> The continued availability of handguns and other firearms for self-defense, according to the court, did not mitigate the burden.<sup>155</sup> The court held that the Maryland law implicated the core of the Second Amendment and that the burden is substantial, and, therefore, remanded the case, instructing the district court to apply strict scrutiny.<sup>156</sup>

When the Fourth Circuit reheard the case en banc, the court held that the Second Amendment does not protect these types of weapons, focusing more on their similarities to military weapons and less on their civilian popularity.<sup>157</sup>

#### F. Possibilities with Justice Gorsuch

Because the Fourth Circuit’s holding split from the holdings of other Circuits,<sup>158</sup> the Supreme Court may decide to take up the issue.<sup>159</sup> After Justice Scalia’s death,<sup>160</sup> the Court shied away from certain issues, including this one.<sup>161</sup> It is possible that the Court may take up this issue now that Justice Gorsuch has been confirmed.<sup>162</sup> As Adam Winkler wrote in *The Atlantic*, “Guns are the new abortion”<sup>163</sup> when it comes to concerns about how a new Supreme Court Justice

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<sup>151</sup> *Id.* at 178.

<sup>152</sup> *Id.* at 179.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 180.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 168.

<sup>157</sup> *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017).

<sup>158</sup> *See supra* note 18.

<sup>159</sup> *See Li, supra* note 23.

<sup>160</sup> Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), [https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?\\_r=0](https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0).

<sup>161</sup> *See Li, supra* note 23.

<sup>162</sup> *Id.*

<sup>163</sup> Adam Winkler, *Why the Supreme Court Won't Impact Gun Rights*, ATLANTIC (June 7, 2016), <http://www.theatlantic.com/politics/archive/2016/06/why-the-supreme-court-wont-restrict-gun-rights/485810/>.

is projected to approach an issue.<sup>164</sup> Leading up to the 2016 presidential election, the Second Amendment was an especially contentious issue.<sup>165</sup>

When Hillary Clinton came out against the *Heller* decision,<sup>166</sup> Donald Trump criticized her for wanting to “dismantle” the Second Amendment.<sup>167</sup> The National Rifle Association (“NRA”) was also vocal during the 2016 campaign and has continued to be during the outset of the Trump administration. In March, 2016, the NRA directly addressed the open Supreme Court seat by issuing a statement condemning President Obama’s Supreme Court nomination, Merrick Garland, asserting that Garland “does not respect our fundamental, individual right to keep and bear arms for self-defense.”<sup>168</sup> The NRA endorsed Donald Trump and strongly opposed Hillary Clinton, choosing to enthusiastically campaign against her.<sup>169</sup> It even released a television advertisement calling her a hypocrite.<sup>170</sup>

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<sup>164</sup> Abortion has traditionally been a very controversial issue for the Supreme Court. Kayla Webley, *Top 10 Controversial Supreme Court Cases*, TIME (Dec. 13, 2010), [http://content.time.com/time/specials/packages/article/0,28804,2036448\\_2036452\\_2036557,00.html](http://content.time.com/time/specials/packages/article/0,28804,2036448_2036452_2036557,00.html). In 1973, the Court held in *Roe v. Wade* that a woman has a right to an abortion via the fundamental right to privacy. *Id.* Over 40 years later, the decision is still hotly contested. *Id.* In October, 2016, then-candidate Donald Trump stated that he would appoint pro-life justices so that overturning the decision would happen “automatically.” Dan Mangan, *Trump: I’ll appoint Supreme Court justices to overturn Roe v. Wade abortion case*, CNBC: ELECTIONS (Oct. 19, 2016, 9:31 PM), <http://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>.

<sup>165</sup> See Rebecca Leber, *Gun Control Can Swing the 2016 Election*, NEW REPUBLIC (Jan. 14, 2016), <https://newrepublic.com/article/127473/gun-control-can-swing-2016-election>.

<sup>166</sup> Robert Barnes, *Trump and Clinton clash on Second Amendment*, WASH. POST (Oct. 19, 2016, 9:32 PM), [https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-fact-checking-and-analysis-of-the-final-2016-presidential-debate/trump-and-clinton-clash-on-second-amendment/?utm\\_term=.d5c563a023f2](https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-fact-checking-and-analysis-of-the-final-2016-presidential-debate/trump-and-clinton-clash-on-second-amendment/?utm_term=.d5c563a023f2).

<sup>167</sup> Awr Hawkins, *Donald Trump: Hillary ‘Wants To Dismantle Our 2nd Amendment,’ Why Not Dismantle Her Security Detail?*, BREITBART (Oct. 11, 2016), <http://www.breitbart.com/big-government/2016/10/11/donald-trump-hillary-wants-dismantle-2nd-amendment-not-security-detail/>.

<sup>168</sup> *NRA Opposes Nomination of Merrick Garland to the U.S. Supreme Court*, NRA-ILA (Mar. 16, 2016), <https://www.nraila.org/articles/20160316/nra-opposes-nomination-of-merrick-garland-to-the-us-supreme-court>.

<sup>169</sup> Daniella Diaz, *NRA spends \$3 million on new anti-Clinton ad*, CNN: POLITICS (Aug. 9, 2016, 11:36 PM), <http://www.cnn.com/2016/08/09/politics/nra-hillary-clinton-donald-trump-election-2016/>.

<sup>170</sup> Sam Frizell, *NRA Releases New Ad Calling Hillary Clinton a ‘Hypocrite’*, TIME (Aug. 9, 2016, 10:32 PM), <http://time.com/4445591/nra-ad-hillary-clinton-hypocrite/>.

One week after Donald Trump won the election, on 60 Minutes, he stated that the next Supreme Court Justice will be “very pro-Second Amendment.”<sup>171</sup> On January 31, 2017, President Trump announced that he chose Tenth Circuit Judge Neil Gorsuch to fill the vacant seat.<sup>172</sup> The NRA praised his choice, stating that Gorsuch “has an impressive record that demonstrates his support for the Second Amendment”<sup>173</sup> and specifically commended Gorsuch’s support for “the individual right to self-defense.”<sup>174</sup> Neil Gorsuch is a “self-proclaimed” Scalia disciple and “originalist.”<sup>175</sup> The Senate confirmed him on April 7, 2017.<sup>176</sup> Many expect him to follow in Justice Scalia’s footsteps,<sup>177</sup> but only time will tell whether he will uphold Justice Scalia’s Second Amendment legacy.

### III. ANALYSIS

The Supreme Court, if presented with the opportunity, should adopt a strict scrutiny standard of review for firearm restrictions reaching the core of the Second Amendment. Section III.A will argue that the Court should afford the Second Amendment the same level of protection as the First Amendment. Section III.B will explain why a sliding standard of scrutiny is appropriate and

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<sup>171</sup> Daniel Terrill, *Trump: Next Justice will be ‘very pro-Second Amendment’*, GUNS.COM (Nov. 15, 2016), <http://www.guns.com/2016/11/15/trump-next-justice-will-be-very-pro-second-amendment/>.

<sup>172</sup> Jacob Pramuk, *Donald Trump chooses Neil Gorsuch for Supreme Court seat*, CNBC: SUPREME COURT (U.S.) (Jan. 31, 2017, 8:05 PM), <http://www.cnbc.com/2017/01/31/donald-trump-chooses-neil-gorsuch-for-supreme-court-seat.html>.

<sup>173</sup> *NRA Applauds Neil Gorsuch’s Nomination to the U.S. Supreme Court*, NRA-ILA (Jan. 31, 2017) [hereinafter *NRA*], <https://www.nraila.org/articles/20170131/nra-applauds-neil-gorsuchs-nomination-to-the-us-supreme-court>. Gorsuch’s record on Second Amendment issues is actually “rather sparse.” Andrew F. Branca, *What Justice Gorsuch Might Mean for the Second Amendment*, NAT’L REVIEW (Feb. 1, 2017, 3:47 PM), <http://www.nationalreview.com/article/444480/neil-gorsuch-united-states-supreme-court-second-amendment-police-seizure-gun>.

<sup>174</sup> *NRA*, *supra* note 173.

<sup>175</sup> See generally *Originalism: A Primer On Scalia’s Constitutional Philosophy*, NPR (Feb. 14, 2016, 5:41 PM), <http://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy>. Justice Scalia described originalism in this way: “The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted.” *Id.*

<sup>176</sup> Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html>.

<sup>177</sup> Michael Bobelian, *Neil Gorsuch’s Nomination To The Supreme Court Promises To Turn Into A Brawl*, FORBES (Feb. 1, 2017, 10:41 AM), <http://www.forbes.com/sites/michaelbobelian/2017/02/01/neil-gorsuchs-nomination-to-the-supreme-court-promises-to-turn-into-a-brawl/#1f4092a97f85>.

how to properly apply it. Section III.C will examine how the Second Circuit decision would have resulted under the proposed standard of review. Section III.D will explain a hypothetical situation in which a restriction would be upheld under this Note's proposed standard. Section III.E will suggest that the Court delineate certain types of firearms as fitting into the core of the Second Amendment so as to make decisions easier for the lower courts. Section III.F will analyze some common misunderstandings related to the Second Amendment and why those misunderstandings are problematic. Section III.G will predict how Second Amendment jurisprudence will fair under Justice Gorsuch.

*A. Courts Should Afford the Second Amendment the Same Level of Protection as the First Amendment*

The Second Amendment is equally as fundamental as the First Amendment, and the Supreme Court should treat it as such. Like the First Amendment, the Second Amendment stemmed from a history of British tyranny.<sup>178</sup> Like their First Amendment freedoms, Americans have long cherished their Second Amendment freedoms.<sup>179</sup> The right to keep and bear arms was long understood as part of the colonists' rights as Englishmen.<sup>180</sup> The language of the amendment itself shows that it was considered a preexisting right: it "shall not be infringed."<sup>181</sup> History demonstrated its significance for hundreds of years, as tyrants tried to disarm their subordinates and their enemies in order to maintain power.<sup>182</sup> The Founders knew this and spoke frequently about the crucial nature of the right to bear arms.<sup>183</sup>

Like the First Amendment, the Supreme Court has explicitly—albeit much later—characterized the Second Amendment as fundamental.<sup>184</sup> Fundamental rights are those which are explicitly or implicitly guaranteed in the Constitution.<sup>185</sup> In the United States, infringements upon fundamental rights receive strict scrutiny review.<sup>186</sup> Therefore, although the Supreme Court has not yet delineated a specific standard of review for firearm restrictions, it follows naturally that the core of the Second Amendment would be protected by strict scrutiny review, just as the core of the First Amendment is protected. In the

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<sup>178</sup> See *supra* note 70 and accompanying text.

<sup>179</sup> See *supra* Section II.A.

<sup>180</sup> See *supra* Section II.A.

<sup>181</sup> See *supra* note 28 and accompanying text.

<sup>182</sup> See *supra* Section II.A.

<sup>183</sup> See *supra* notes 45–48 and accompanying text.

<sup>184</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

<sup>185</sup> See *supra* Section II.B.

<sup>186</sup> See *supra* Section II.B.

words of Justice Thomas, “The Constitution does not rank certain rights above others, and . . . this Court should [not] impose such a hierarchy by selectively enforcing its preferred rights.”<sup>187</sup>

*B. The Supreme Court Should Adopt a Sliding Scale of Scrutiny for Second Amendment Restrictions*

This Section will propose a sliding scale of scrutiny for Second Amendment restrictions. It will analyze why the Second Circuit’s decision was flawed, why the Fourth Circuit’s original decision was proper, and why the Fourth Circuit’s en banc decision was wrong.

Because the First Amendment and the Second Amendment are equally fundamental, courts should interpret the rights under each in a similar fashion. The First Amendment is not unlimited.<sup>188</sup> As discussed above, restrictions upon content-neutral speech receives intermediate scrutiny review.<sup>189</sup> If the restriction reaches the core of the First Amendment, though, which is content-based speech, strict scrutiny is the proper standard of review.<sup>190</sup> Similarly, the Second Amendment is not unlimited.<sup>191</sup> In *Heller*, Justice Scalia acknowledged certain situations in which the right to keep and bear arms may be restricted.<sup>192</sup> The Court, therefore, should use the same type of sliding scale scrutiny for the Second Amendment as it does for the First: strict scrutiny for the core, and intermediate scrutiny for the rest.

When a speech restriction is content-based, the Court applies strict scrutiny review because content is at the core of what the First Amendment was designed to protect.<sup>193</sup> Similarly, the Court should find that if a firearm restriction reaches a weapon that is in common use, in the home, for a self-defense purpose, it should apply strict scrutiny to any and all restrictions on such weapons because they are at the core of what the Second Amendment was designed to protect.<sup>194</sup> Justice Scalia stated that restrictions such as prohibiting possession by felons, possession by the mentally ill, carrying in schools and government buildings, and regulating the commercial sale of such firearms were all acceptable under the

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<sup>187</sup> *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from denial of certiorari).

<sup>188</sup> *See supra* Section II.C.

<sup>189</sup> *See supra* note 79 and accompanying text.

<sup>190</sup> *See supra* notes 75–76 and accompanying text.

<sup>191</sup> *See supra* note 99 and accompanying text.

<sup>192</sup> *See supra* note 99 and accompanying text.

<sup>193</sup> *See supra* note 76 and accompanying text.

<sup>194</sup> *See supra* note 109 and accompanying text.

Constitution.<sup>195</sup> If, for example, possession or ownership of a weapon falls into one of these situations, it is acceptable to apply intermediate rather than strict scrutiny—just as the Court does for content-neutral speech.<sup>196</sup>

The idea is that if a regulation affects firearms within the core of what the Second Amendment was meant to protect, it gets the highest protection available. Whether alternatives are available is irrelevant. A court would never uphold a restriction of free speech on a sidewalk merely because free speech was still available in the park. The Second Circuit held in *Cuomo* that because alternatives were available, the burden was not substantial.<sup>197</sup> As the court in *Kolbe* argued, if this were true, the court could say that because light sabers are available, then the restrictions are okay.<sup>198</sup> Using a sliding scale of scrutiny would defeat the argument that this standard of review is, as Gerald Gunther famously put it, “strict in theory, but fatal in fact”<sup>199</sup> because it still allows for reasonable regulations of firearm ownership. In light of *Heller*, which defined the core of the Second Amendment, and *McDonald*, which held that the right was fundamental, it is improper to afford anything but strict scrutiny to restrictions upon the core of what the Second Amendment was designed to protect.

### 1. Why the Second Circuit’s Approach Was Flawed

The Second Circuit wrongly decided that the availability of other weapons made the burden on the right to own a commonly-owned AR-15 style weapon unsubstantial.<sup>200</sup> It reasoned that because other alternatives remained for people to defend themselves, such a restriction was acceptable.<sup>201</sup> Essentially, because New York and Connecticut had not enacted total bans, the court found it was not a strict scrutiny question.<sup>202</sup> This would never be acceptable to us as Americans if it pertained to free speech. Any and all restrictions upon content-based speech are subject to strict scrutiny review.<sup>203</sup> It is not up to the courts to decide which types of content-based speech are acceptable and which are not.

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<sup>195</sup> See *supra* note 100 and accompanying text.

<sup>196</sup> See *supra* note 79 and accompanying text.

<sup>197</sup> See *supra* note 139 and accompanying text.

<sup>198</sup> *Kolbe v. Hogan*, 813 F.3d 160, 181 (4th Cir. 2016) (citing *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)).

<sup>199</sup> JAMES A. CURRY ET AL., *CONSTITUTIONAL GOVERNMENT: THE AMERICAN EXPERIENCE* 327 (10th ed. 1989).

<sup>200</sup> See *supra* note 139 and accompanying text.

<sup>201</sup> See *supra* note 139 and accompanying text.

<sup>202</sup> See *supra* note 139 and accompanying text.

<sup>203</sup> See *supra* note 76 and accompanying text.



This type of standard could easily be abused by courts, allowing biased judges to avoid applying strict scrutiny simply because other options are available. A sliding scale of scrutiny is much easier and more fair to apply, and it is less likely to be abused. In similar fashion, it is not up to the court to decide which types of constitutionally-protected firearms are acceptable and which are not. Once a court finds that the weapons in question are commonly-owned in the home with a primary purpose of self-defense,<sup>204</sup> it should apply strict scrutiny.

## 2. Why the Fourth Circuit's Original Approach Was Proper

The Supreme Court should follow the Fourth Circuit's original lead and adopt a two-part analysis that first determines whether a firearm restriction falls within the core of the Second Amendment's purpose, and, if it does, apply strict scrutiny.<sup>205</sup> In practice, this means that if a weapon is in common use and typically possessed by law-abiding citizens for lawful purposes, any government restriction on its ownership is subject to a strict scrutiny standard of review. Essentially, if it reaches the core, it receives strict scrutiny, and if it does not, it may receive intermediate scrutiny.

This should include regulations that completely ban *Heller*-protected types of weapons and regulations that substantially burden ownership and possession of them. This is not to say that carrying these weapons around on the streets is automatically subject to strict scrutiny. As Justice Antonin Scalia pointed out in *Heller*, the right is not unlimited, and certain restrictions can be acceptable, such as prohibiting possession by felons, possession by the mentally ill, carrying in schools and government buildings, and regulating the commercial sale of such firearms.<sup>206</sup>

## 3. Why the Fourth Circuit's En Banc Decision Was Wrong

When the Fourth Circuit reheard *Kolbe* en banc, it affirmed the district court, holding that the weapons in question are not protected by the Second Amendment.<sup>207</sup> The court found that the Second Amendment does not even reach the type of weapon at issue in the case, and if it did, the statute would withstand an intermediate scrutiny analysis, thus making it constitutional.<sup>208</sup>

First, the court accepted flawed reasoning—which the Second Circuit accepted as well—that because citizens are still “free to protect themselves with

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<sup>204</sup> See *supra* note 109 and accompanying text.

<sup>205</sup> See *supra* note 156 and accompanying text.

<sup>206</sup> See *supra* note 99 and accompanying text.

<sup>207</sup> *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017).

<sup>208</sup> *Id.* at 130.

a plethora of other firearms and ammunition,” the restriction does not violate the Second Amendment.<sup>209</sup> This idea, as the dissent pointed out, is blatantly rejected in *Heller*.<sup>210</sup> Additionally, as argued above, this logic is akin to arguing, for example, that prohibiting political speech in a public park is acceptable because political speech is still available on the nearby college campus. Any restriction at all is a violation, no matter how many other alternative options are available.

Next, the majority likened assault weapons to “exceptionally lethal weapons of war.”<sup>211</sup> It argued that because AR-15s are like M16s in that they are “most useful in military service,” they are not protected under the Second Amendment.<sup>212</sup> This argument is not persuasive because, as the dissent pointed out, AR-15s are not used by the military very often at all; in fact, they are technically the semi-automatic (as opposed to fully automatic)<sup>213</sup> civilian version of the M16.<sup>214</sup>

The majority tried to draw parallels between the fire rate of an M16 and the fire rate of an AR-15.<sup>215</sup> It emphasized the fact that an AR can fire off many rounds quickly, but it essentially ignored the idea that many handguns—explicitly protected by *Heller*—are semi-automatic and can do the same.<sup>216</sup> Next, the majority scrutinized the dissent’s focus on what is in common use at the time—a key question and part of the Second Amendment’s core as prescribed in *Heller*.<sup>217</sup> The majority called this a “popularity test” and criticized how difficult it is to define what is in common use.<sup>218</sup>

The majority seemed bothered that the dissenters (members of the judiciary) would take the question of which firearms are acceptable to own away from the legislature.<sup>219</sup> As the dissent pointed out, the members of the Constitutional Convention intended the Bill of Rights to take the question out of

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<sup>209</sup> *Id.* at 138.

<sup>210</sup> *Id.* at 162–63 (Traxler, J., dissenting); *see also* District of Columbia v. *Heller*, 554 U.S. 570, 629 (2008) (“It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed.”).

<sup>211</sup> *Kolbe*, 849 F.3d at 141.

<sup>212</sup> *Id.* at 137.

<sup>213</sup> *See supra* note 9.

<sup>214</sup> *Kolbe*, 849 F.3d at 159 (Traxler, J., dissenting) (“The irony is that millions of law-abiding Americans *actually use* these versatile guns, while there do not seem to be any military forces that routinely carry an AR-15 or other semiautomatic sporting rifles as an officially-issued service weapon—at least the majority has not identified any.”).

<sup>215</sup> *Id.* at 124–25 (majority opinion).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 141–42.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

the hands of both the legislature and the judiciary—and place it in the hands of the American people.<sup>220</sup>

### C. *How Decisions Will Differ Under Proposed Standard of Scrutiny*

To help illustrate how the new standard of scrutiny would play out in the courts, this Section will examine how the Second Circuit's decision in *Cuomo* would have turned out differently if the court had applied the same test that the Fourth Circuit originally applied in *Kolbe*.

#### 1. Applying the Fourth Circuit's Test to the Second Circuit's Case

In the Second Circuit's decision (*Cuomo*), the court applied a two-part test that differed from the test originally applied by the Fourth Circuit (*Kolbe*). In *Cuomo*, the court first determined whether the regulated weapons fell within the protections of the Second Amendment. If they did, it considered the nature and severity of the infringement and then applied the appropriate level of scrutiny.<sup>221</sup> The court, for the sake of argument,<sup>222</sup> held that the weapons did fall under the core of the Second Amendment—that they are typically possessed by law-abiding citizens for lawful purposes.<sup>223</sup>

Taking a step back, the court should have found this was true with or without the “sake of argument.” As stated above, in 2012, the number of AR- and AK- style weapons manufactured and imported into the United States was more than double the number of Ford F-150 trucks sold (the most commonly sold vehicle in the United States).<sup>224</sup> Over 20–30 million of these weapons are owned in America.<sup>225</sup>

At the next step, the court considered the nature and severity of the infringement.<sup>226</sup> This is where the court erred. The court found that the restriction

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<sup>220</sup> *Id.* at 162 (“[T]he Second Amendment confers rights upon individual citizens—not state governments,” and it clearly does not “delegate to States and localities the power to decide which firearms people may possess. ‘The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.’”) (citations omitted).

<sup>221</sup> See *supra* note 126 and accompanying text.

<sup>222</sup> See *supra* note 127–41 and accompanying text.

<sup>223</sup> See *supra* note 122–33 and accompanying text.

<sup>224</sup> See *supra* note 9.

<sup>225</sup> Wing, *supra* note 13.

<sup>226</sup> See *supra* note 126 and accompanying text.

did not “substantially” burden exercise of the Second Amendment because there was no absolute prohibition, so it did not receive strict scrutiny.<sup>227</sup>

A better approach after step one would be to immediately apply strict scrutiny. It has already been decided in *Heller* that the core of the Second Amendment protects commonly used weapons in the home that have a self-defense purpose.<sup>228</sup> It should not matter whether other alternatives were available or if the restriction was unsubstantial. The core of the Second Amendment, which is a fundamental right, deserves the protection of strict scrutiny review. The Second Circuit’s approach gives courts flexibility to decide “how bad” an infringement is on a fundamental right. As argued above, courts do not determine “how bad” political speech is; all political speech is protected because it falls within the core of what the First Amendment was meant to protect. Likewise, the Second Amendment was meant to protect commonly used firearms in the home that have a self-defense purpose, and all infringements upon this should pass a strict scrutiny test.

#### *D. A Hypothetical Situation that Would Not Reach the Core*

Some may think that this Note’s proposal creates too high of a standard, and all firearm restrictions will be prohibited. That is not the case. This Section presents a hypothetical situation in which the proposed test stops at step one, and step two is never reached—a situation, therefore, in which intermediate scrutiny would be appropriate.

Say that an experienced gun owner, Bobby, lives in West Virginia<sup>229</sup> (not hard to imagine).<sup>230</sup> He generally never goes anywhere without his gun. One day, as he does every day, Bobby brings his handgun into the post office with him to check his PO Box. An older lady sees him with his gun, gets scared, and calls the police. The police run over from next door and arrest him for violating a federal regulation which states that “[N]o person while on postal property may carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, or store the same on postal property, except for official purposes.”<sup>231</sup> Bobby sues, alleging that the law violates his Second Amendment rights. He believes the right to keep and bear arms allows him to carry a gun with

<sup>227</sup> See *supra* notes 135–41 and accompanying text.

<sup>228</sup> See *supra* note 109 and accompanying text.

<sup>229</sup> Also known as “Almost Heaven.”

<sup>230</sup> On August 25, 2017, West Virginia led 21 states in challenging the Maryland gun restrictions litigated in *Kolbe*. *West Virginia Leads 21 States Opposing Gun Restrictions*, U.S. NEWS (Aug. 25, 2017, 3:05 PM), <https://www.usnews.com/news/best-states/west-virginia/articles/2017-08-25/west-virginia-leads-21-states-opposing-gun-restrictions>.

<sup>231</sup> 39 C.F.R. § 232.1(l) (2017).

him wherever and whenever he pleases. What would be the outcome under *Heller* and this Note's proposed test?

First, the court would look to step one: does the regulation implicate the core of his Second Amendment right? At this point, we harken back to *Heller*'s holding: the core of the Second Amendment is meant to protect, at a minimum, weapons commonly used, in the home, for self-defense. Is the handgun commonly used? Likely yes. *Heller* explicitly stated that the handgun is the most commonly owned firearm to keep in the home for self-defense.<sup>232</sup> Does Bobby use the firearm for self-defense? It would ultimately be up to the court, but Bobby would have a compelling "yes" argument. Was it in the home? No, it was not. That raises the first flag that the regulation might not reach the core of the Second Amendment. Additionally, a post office is a federal building. Justice Scalia said in *Heller* that the Second Amendment is not unlimited, and he explicitly listed certain types of situations in which gun protections would be more lenient.<sup>233</sup> It is reasonable to regulate the Second Amendment more vigorously in sensitive places such as federal buildings.<sup>234</sup> In this situation, therefore, the court would likely stop its analysis at step one. This regulation does not reach the core of the Second Amendment, and it is perfectly within its scope. It is, therefore, acceptable for the court to apply intermediate scrutiny. There would be no need to go to step two and apply strict scrutiny because step one is not met.

Therefore, there are reasonable scenarios in which gun regulations may still be protected. The point of this Note is to argue that weapons in the home, commonly used, for self-defense, should receive the utmost protection.

*E. The Court May Wish to Delineate Types of Firearms that Are Commonly Used*

In order for lower courts to better understand when strict scrutiny is appropriate to use, the Supreme Court may wish to delineate more types of firearms, in addition to handguns, that are commonly used and kept in the home for self-defense. For instance, the Court may wish to specifically include the AR-15 due to its immense popularity and common ownership in the home.<sup>235</sup> This would help provide clarity to future courts when analyzing specific types of firearm regulations.

The Fourth Circuit's en banc majority explicitly referred to the problems with deciding what is commonly used and what is not.<sup>236</sup> It posed the question,

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<sup>232</sup> See *supra* note 110 and accompanying text.

<sup>233</sup> See *supra* note 99 and accompanying text.

<sup>234</sup> See *supra* note 100 and accompanying text.

<sup>235</sup> Wing, *supra* note 13.

<sup>236</sup> Kolbe v. Hogan, 849 F.3d 114, 143–46 (4th Cir. 2017).

“How many assault weapons and large-capacity magazines must there be to consider them ‘in common use at the time’?”<sup>237</sup> It asked whether we should focus on how many firearms there are, how many owners there are, ownership in one state or the entire country, and more.<sup>238</sup> These questions are legitimate, and it may be beneficial to all courts in the future if the Supreme Court were to establish a standard for them to use.

#### F. Misunderstandings

As is the case with any hotly contested issue, many misunderstandings exist about what, exactly, an “assault weapon” is and what it is capable of doing. Politicians are master fear mongers, and guns—by their very nature—can be especially scary. In the wake of mass shootings and violence in the inner cities, it can be tempting to curb Second Amendment liberties in the name of safety. These ideas are a quick fix—a band-aid on a society with deeper problems. Courts should be especially careful to do this due to the fundamental nature of the Second Amendment. As Benjamin Franklin once said, “Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”<sup>239</sup> This is especially true when there is no proof that the restriction would produce more safety in the first place.

A strong example of misinformation regarding gun rights was on display during a 2016 Presidential Debate between Hillary Clinton and Donald Trump. Debate moderator Chris Wallace asked the candidates about the Second Amendment and the *Heller* decision, and Clinton said,

I disagreed with the way the court applied the Second Amendment in that case because what the District of Columbia was trying to do was to protect toddlers from guns. And so they wanted people with guns to safely store them. And the court didn’t accept that reasonable regulation, but they’ve accepted many others.<sup>240</sup>

This is patently false. In fact, the *Heller* decision had nothing to do with toddlers. The plaintiff in *Heller* was a police officer who already had permission to carry

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<sup>237</sup> *Id.* at 136.

<sup>238</sup> *Id.*

<sup>239</sup> *Ben Franklin’s Famous ‘Liberty, Safety’ Quote Lost Its Context In 21st Century*, NPR (Mar. 2, 2015, 4:15 PM), <http://www.npr.org/2015/03/02/390245038/ben-franklins-famous-liberty-safety-quote-lost-its-context-in-21st-century>.

<sup>240</sup> Meghan Keneally, *Hillary Clinton Slammed for Her Characterization of Supreme Court Gun Ruling*, ABC NEWS (Oct. 21, 2016, 5:09 PM), <http://abcnews.go.com/Politics/hillary-clinton-slammed-characterization-supreme-court-gun-ruling/story?id=42965863>.

a gun at work but was restricted from having one in his home.<sup>241</sup> Her answer provided misinformation to anyone who has not read or learned about the decision (which, we can presume, includes most Americans). Hillary Clinton led the American public to believe that the *Heller* decision allowed toddlers to get guns, which is unacceptable if we are going to have a mature conversation about firearms.

It is important to ensure that restrictions serve some sort of government interest. In fact, under this Note's proposed strict scrutiny review for the Second Amendment's core, the government interest must be compelling. In banning ownership of assault-style rifles in order to save lives, legislators are ignoring some key information. In reality, handguns—which are explicitly protected under *Heller*—are used in far more murders than assault-style rifles.<sup>242</sup> So are knives.<sup>243</sup> It is also important to note that speed at which a shooter can fire an AR-15 is no different from the speed at which he can fire a highly-common semi-automatic pistol.<sup>244</sup> The shooter still has to pull the trigger for every shot.<sup>245</sup> The AR-15, which is the subject of many proposed regulations, is the civilian version of its model and as popular as the Ford-150.<sup>246</sup> We already have restrictions—legal restrictions—on *fully* automatic weapons, which continuously fire as the shooter holds down the trigger.<sup>247</sup> As a society, we should hesitate to curb liberties, especially if we lack a full understanding of each weapon's capabilities and whether it will truly increase safety in the community.

### G. Predictions with Justice Gorsuch

Now that the Senate has confirmed Justice Gorsuch, the Court may choose to take up some pertinent Second Amendment issues, including this one.

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<sup>241</sup> See *supra* note 89 and accompanying text.

<sup>242</sup> In 2013, 8,454 people were murdered by someone who used a firearm. *Crime in the United States 2013*, FBI: UCR, [https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_8\\_murder\\_victims\\_by\\_weapon\\_2009-2013.xls](https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls) (last visited Oct. 9, 2017). There were 5,782 murders committed by a shooter with a handgun (68% of total gun murders), but only 285 murders were committed by someone with a rifle (3% of total gun murders). This statistic includes any type of rifle, including assault-style rifles. *Id.*

<sup>243</sup> *Id.* (displaying that in 2013, 1,490 people were murdered by someone who used a knife or other cutting instrument, compared to 285 who died after being shot with a rifle).

<sup>244</sup> See *supra* note 9.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Sean Davis, *Here Are The Actual Federal Laws Regulating Machine Guns In The U.S.*, *FEDERALIST* (Oct. 2, 2017), <http://thefederalist.com/2017/10/02/actual-federal-laws-regulating-machine-guns-u-s/>.

Many believe he will be similar to Justice Scalia,<sup>248</sup> but his record on the Second Amendment is actually fairly sparse.<sup>249</sup> Justices John Roberts, Anthony Kennedy, Clarence Thomas, and Samuel Alito joined Justice Scalia in the *Heller* decision, so if Gorsuch and the others fall in line, the majority needed to create a strict scrutiny standard would exist.<sup>250</sup>

A group of citizens has filed a petition to the Supreme Court seeking to reverse the Fourth Circuit's en banc *Kolbe* decision. According to the NRA-ILA, "[t]he petition asks the Supreme Court to confirm that its ruling in *District of Columbia v. Heller* protects the most popular semiautomatic rifles and magazines."<sup>251</sup> On the other hand, now that the Fourth Circuit has held en banc that assault-style rifles are not protected by the Second Amendment, all circuits that have spoken to the issue are in agreement that intermediate scrutiny is appropriate for restrictions upon their ownership of assault-style rifles. For this reason, therefore, it is possible that the Supreme Court will continue its avoidance of the issue so as not to go against every circuit. Even though all circuits are in agreement, however, the Court has the unique opportunity to make its voice loud and clear by doing the right thing—by protecting the core of the American Second Amendment with strict scrutiny review, the very standard that the Court affords other fundamental liberties in America.

#### IV. CONCLUSION

The Second Amendment is an individual right to self-defense, and it is a fundamental American liberty.<sup>252</sup> This was explicitly stated in *Heller*, and then in *McDonald*, and history overwhelming supports these conclusions.<sup>253</sup> In the United States, infringements upon fundamental rights receive strict scrutiny review in court.<sup>254</sup> The Supreme Court, however, did not specifically designate a standard of review in either *Heller* or *McDonald*.<sup>255</sup> Since then, circuit courts of appeal have reached different conclusions on which standard to apply.<sup>256</sup>

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<sup>248</sup> See *supra* note 177 and accompanying text.

<sup>249</sup> Holbrook Mohr, *Neil Gorsuch 'is a Second Amendment mystery' on key gun rights issues*, BUS. INSIDER (Mar. 16, 2017, 11:08 AM), <http://www.businessinsider.com/neil-gorsuch-is-a-second-amendment-mystery-on-key-gun-rights-issues-2017-3>.

<sup>250</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>251</sup> *Supreme Court Asked to Review Maryland's Gun Ban*, NRA-ILA (July 21, 2017), <https://www.nra-ila.org/articles/20170721/supreme-court-asked-to-review-marylands-gun-ban>.

<sup>252</sup> See *supra* notes 15–16 and accompanying text.

<sup>253</sup> See *supra* Section II.A.

<sup>254</sup> See *supra* Section II.B.

<sup>255</sup> See *supra* Section II.D.

<sup>256</sup> See *supra* Section II.E.



When presented with the opportunity, the Court should adopt a strict scrutiny standard of review for restrictions that reach the core of the Second Amendment.

*Heller* laid out the bare minimum of the Second Amendment's core: commonly used firearms, in the home, for self-defense.<sup>257</sup> At a minimum, a handgun falls into this category,<sup>258</sup> but other firearms likely do as well. After finding that a weapon is commonly used in the home for self-defense, courts should apply strict scrutiny review of legislation that infringes upon the right to own such a weapon. The core of the First Amendment's freedom of speech is protected by strict scrutiny review,<sup>259</sup> and the core of the Second Amendment deserves the same treatment.

The Second Amendment, like the First Amendment, is not unlimited.<sup>260</sup> For example, restrictions on felon firearm possession or prohibitions on carrying weapons into government buildings can be constitutionally upheld.<sup>261</sup> Dangerous and unusual weapon bans can be upheld as well.<sup>262</sup> These types of restrictions, under *Heller*, can receive a lower standard of review than strict scrutiny. This is similar to the way courts treat content-neutral speech restrictions, which receive intermediate scrutiny.<sup>263</sup> Content-based speech restrictions, however, receive strict scrutiny because they are at the core of what the First Amendment was designed to protect.<sup>264</sup> A sliding scrutiny standard would be clearer, easier to use, and provide useful, much-needed guidance to lower courts in analyzing firearm restrictions.

In the post-*Heller* and post-*McDonald* world, circuits have wrestled with the issue of which standard of review to apply to firearm restrictions. In some areas of the country, this has resulted in the whittling away of the Second Amendment's meaning.<sup>265</sup> The Supreme Court should delineate a strict scrutiny standard of review for restrictions reaching the core of the Second Amendment in order to protect this fundamental American liberty. It would be the same level of protection afforded to the core of free speech under the First Amendment.<sup>266</sup> The Second Amendment's core deserves the highest level of protection in every

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<sup>257</sup> See *supra* note 109 and accompanying text.

<sup>258</sup> See *supra* note 109 and accompanying text.

<sup>259</sup> See *supra* Section II.C.

<sup>260</sup> See *supra* note 99 and accompanying text.

<sup>261</sup> See *supra* note 100 and accompanying text.

<sup>262</sup> See *supra* note 131 and accompanying text.

<sup>263</sup> See *supra* note 80 and accompanying text.

<sup>264</sup> See *supra* note 76 and accompanying text.

<sup>265</sup> Adam Nagourney & Erik Eckholm, *2nd Amendment Does Not Guarantee Right to Carry Concealed Guns, Court Rules*, N.Y. TIMES (June 9, 2016), <https://www.nytimes.com/2016/06/10/us/second-amendment-concealed-carry.html>.

<sup>266</sup> See *supra* Section II.C.

jurisdiction in order to adequately protect American liberties. As the State of West Virginia said in its petition for certiorari in reversing the en banc *Kolbe* decision, it would “send a clear message to the lower federal courts that the standards set forth in *Heller* must be faithfully applied.”<sup>267</sup> After all, the Second Amendment is not a lesser part of the Bill of Rights; it is “what makes the other nine possible.”<sup>268</sup>

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<sup>267</sup> Brief for The State of West Virginia et al. as Amici Curiae Supporting Petitioners, *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (No. 17-127), 2017 WL 3809732, at \*4.

<sup>268</sup> Bill Flax, *The 2nd Amendment Is What Makes The Other Nine Possible*, FORBES (Jan. 15, 2013, 7:06 PM), <http://www.forbes.com/sites/billflax/2013/01/15/the-2nd-amendment-is-what-makes-the-other-nine-possible/#2c677f681494>.

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